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Supreme Court of the United States

October Term, [illegible]

No. [illegible]

General Motors Corporation, *Petitioner*,

v.

District of Columbia, *Respondent*.

On Petition for Writ of Certiorari to United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 352

GENERAL MOTORS CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for Writ of Certiorari to United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

In the view of respondent, the questions presented are:

Where the Congress acting under its plenary power over the District of Columbia provided, in the District of Columbia Income and Franchise Tax Act of 1947, for the imposition of a franchise tax upon corporations engaged in trade or business in the District of Columbia to be measured by "that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade

or business carried on or engaged in within the District and such other net income as is derived from sources within the District," and where, pursuant to the act, the Commissioners of the District adopted regulations containing a formula for the apportionment of the income of corporations engaged in the District and elsewhere in selling personal property on the basis of the ratio which such sales in the District by the corporation bear to its sales everywhere, and where this method of apportionment was applied by the District to General Motors Corporation, was not the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, correct in holding:

1. That the apportionment formula prescribed in the Commissioners' regulations for apportioning net income, is a valid formula under the District of Columbia Income and Franchise Tax Act of 1947 and, as such, applicable to General Motors Corporation?

2. That the Commissioners' apportionment formula is not violative of or in conflict with the Constitution or decisions of this Court, and that its application to petitioner does not apportion to the District of Columbia net income in excess of that attributable to petitioner's activities within the District?

COUNTER-STATEMENT OF THE CASE

General Motors Corporation's principal business is the manufacture and sale of automobiles, trucks, and other types of motor vehicles, and the parts, engines, and accessories therefor. Although it does not conduct manufacturing or assembling operations in the District, it maintains, within and without the District, offices and personnel for the conduct of its business, including selling and promoting in the District the sale of its various products. (R. 399-409.) General Motors' methods of doing business, including selling and distributing its products, are the same throughout the country, including the District of Columbia. (R. 400.)

General Motors, in addition to a central management staff, is organized into divisions operating substantially independent of each other, although none are separately incorporated. There are five car divisions. Four of these divisions (Pontiac, Buick, Oldsmobile, and Chevrolet) operated both in the District and elsewhere in a substantially identical manner in the promotion and sale by the divisions of automobiles, parts, and accessories. These divisions moved their merchandise through dealers under contract with General Motors which, with certain exceptions not material in this case, sold its products only to such dealers for resale by them. (R. 400-416.) The dealer agreements contained detailed recitations of the parties' obligations and responsibilities. Each contained provisions concerning prices to be paid for General Motors' products, the authority of the dealer to sell those products, delivery of the products by General Motors, the obligation of the dealer to maintain a satisfactory place of business and to remain in that place unless authorized to move, the maintenance by the dealer of General Motors' standards for capital and net worth, the maintenance by the dealer of accounting records as specified by General Motors, and the making of both financial and operating statements to that corporation monthly. The agreements further provided for rendition of satisfactory sales performance and satisfactory service to the purchasers of General Motors products, the maintenance of adequate records and personnel, as well as an adequate number and assortment of parts and accessories. Detailed provisions were included in the agreement for the termination of the agreement by General Motors, or by the dealer. (Pet. Ex. 4-b, 4-c; R. 430-33.)

The remaining car division, Cadillac, conducted its activities in a manner different from the other divisions, the principal difference being that Cadillac, instead of entering into agreements with dealers, appointed distributors for the merchandising of its products who, in turn, appointed dealers. (R. 416-22.)

During the years in question Pontiac Division had four Pontiac dealers in the District; Oldsmobile had five Oldsmobile dealers in the District; Chevrolet Motor Division had five Chevrolet dealers in the District; and Cadillac Motor Division had a distributor in the Disttrict, which distributor was also a retail Cadillac dealer. (R. 401, 410-14, 416-17.)

Although only Chevrolet maintained an office in the District, each of the other divisions, from nearby offices, continuously and regularly sent personnel into the District for the purpose of promoting the sale and selling General Motors' products, working with dealers and, in general, conducting within the District all activities requisite to the division's business in the District. Chevrolet's activities in this regard were similar in nature although carried on both from its District office as well as through personnel located in offices outside the District. (R. 400-416.)

With the exception of the Cadillac Division the operations of the car divisions, both in the District and elsewhere, typically are as follows:

The country is divided into regions, each of which is supervised by a regional manager. The regions are divided into zones and each zone has a zone manager who is directly in charge of the zone and responsible for the overall activity of the zone office. The zone manager and his assistant make periodic visits to the various dealers in the zone for the purpose of working with dealers and maintaining their interest in items which will help in the retail sales of automobiles by the dealers, as well as promoting the sale of promotional literature. Within the zone are a number of district managers who are responsible for carrying on with the dealers the same type of activities as do the zone manager and his assistant. There is also a business management manager within the zone, most of whose time is spent in assisting dealers within the zone in making their operations more profitable. Other personnel working with deal-

ers within the zone include a parts and services manager who performs multiple functions relating to assisting the dealer in maintaining proper inventories and in promoting service; a claims administrator with an assistant whose functions are the processing of complaints from customers and of dealers' claims pursuant to warranties; and service representatives whose activities are substantailly the same as those of the parts and services manager. (R. 400-416.)

General Motors maintains in Baltimore a parts division warehouse which fills orders of its dealers for parts, shipping such items directly to the dealer. In the case of Pontiac, the zone office maintains a stock of cars in warehouses outside the District, selling approximately 50 to 100 cars a month to dealers who themselves pick up the cars. (R. 403, 407.) Chevrolet Division has a fleet manager in Chevrolet's District of Columbia office whose function it is to contact local and national fleet users in the District and elsewhere supplying them technical information and promoting orders for vehicles to be placed by fleet customers with dealers. (R. 414.) In the case of Chevrolet dealers, orders are sent by the dealer directly to Chevrolet's office in Baltimore which also serves the District of Columbia, and whose personnel operate substantially the same as the personnel of the other car divisions, processing, *inter alia*, owners' complaints regarding service by District dealers, applications for dealerships, and other functions. (R. 411-16.)

The Cadillac Division has one distributor located in the District of Columbia, the only retail Cadillac outlet in the District. Cadillac Division's personnel maintain contact with distributors and, through the distributors, with Cadillac dealers. The functions of these personnel are substantially the same as the functions described for personnel of the other divisions. (R. 416-22.)

Among the operating divisions of General Motors is GMC Truck and Coach Division which operates in a man-

ner similar to that of the car divisions and which appoints dealers in various areas including the District of Columbia. This division manufactures vehicles and parts which are sold to dealers who, in turn, sell them to the public. Personnel of the division regularly visit the dealers for the purpose of promoting the sale of petitioner's products and assisting dealers in their operations, including the making of contacts with potential customers for the division's products. (R. 416-30.)

United Motors Service Division manufactures and sells parts and accessories to wholesalers. It maintains in the District a zone office with personnel whose function it is to promote the sale of the division's products through wholesalers. The district zone manager also has the function of making direct contact with customers of the wholesaler. This division's personnel function along lines similar to those of the car divisions. The division has seventeen wholesalers within the District, all of which are under written contract. (R. 446-50.)

The AC Spark Plug Division has an office in the District maintained for government contact purposes, but civilian items manufactured by the division are sold to customers in the District through other personnel who regularly travel to the District for the purpose of contacting the division's warehouse distributors who are under written contract with General Motors. These personnel promote sales and assist the dealers and other purchasers of the division's products. (R. 435-38, 450-56.)

Motors Holding Division, in its operation of financing dealers, receives all of the voting stock of a dealer and nominates a majority of its directors. During the period the dealer is under financing by the division, it maintains close supervision over the dealer's activities to insure successful operation. During 1957-1958, Motors Holding financed four dealers in the District. (R. 459-62.)

General Motors Acceptance Corporation (GMAC), whose function it is to provide to a dealer financing of new car purchases, financed during 1957 and 1958 all four of the Pontiac dealers in the District. Under this financing, GMAC secured title to all automobiles purchased by the dealers, title passing to GMAC at the factory. (R. 406-07.)

In addition to the regular operations of car division personnel, other officials of the several divisions made regular business visits to the District, and division zone personnel actively participate in an annual automobile show held in the District and supply display materials and automobiles for the show. The activities of the personnel of the several car divisions, in respect of assisting and advising dealers as well as the activities directly related to the public, are designed to promote sales and to attract retail customers to the dealers. The affect was, thus, to cause orders from the dealers for petitioner's products to flow to General Motors automatically without the necessity for specific solicitation. (R. 408-10.)

General Motors also maintained offices within the District for the following activities: its Government Sales Section (liaison activities related to government purchase of trucks and passenger car vehicles) (R. 433-35), Cleveland Diesel Engine Division (government liaison in connection with sales of defense materials) (R. 442-44), Detroit Diesel Engine Division (government liaison in connection with sales of defense materials) (R. 444-46), United Motors Service Division (sales at wholesale of parts and accessories) (R. 446-50), AC Spark Plug Division (military type manufactiung, manufacture of automotive parts, government liaison and contact) (R. 435-38), Motors Holding Division (financing dealers with voting control in General Motors) (R. 459-62), Business Research Staff (forecasting economic conditions and effect on sales) (R. 456-57), General Motors Overseas Division (dealing with United States and other governments and international

agencies in respect of products sold abroad) (R. 457-59), Patent Section (patent research and detailed work regarding litigation) (R. 462), and Public Relations Staff (lobbying, press and communications relations, services to General Motors visiting executives) (R. 462-64). In addition, General Motors Acceptance Corporation, a wholly-owned subsidiary, which financed dealers, had an office in the District. (R. 406-07.)

During the course of the trial before the Tax Court, petitioner produced four economists to state their views on the propriety, from an economic standpoint, of the application to General Motors of the District's apportionment formula. Each of these economists stated that the formula to be used should consist of the factors of capital investment (property) and labor (payroll) or costs. On the matter of the inclusion of sales as a factor in the formula, one of the economists stated unequivocally that he would allow only for the factors of property and payroll, without consideration to sales. Although not subscribing to a three-factor formula which would include sales as one of the factors (since in their view as economists income is produced only by capital and labor), petitioner's remaining witnesses were substantially in agreement that a three-factor formula which includes sales as one of the elements would not be particularly objectionable because sales, in some way or other, might reflect costs. Thus, there was disagreement among petitioner's own witnesses concerning a proper formula. (R. 68-69, 72-73, 99-100, 127, 151-54, 351-54, 356.)

Three expert economists testified for the District. Contrary to the testimony of petitioner's witnesses, the District's experts were in complete agreement that the District's apportionment formula is entirely reasonable and provides an appropriate formula for the purpose of apportioning General Motors' net income. These witness were further of the opinion that a two-factor formula consisting

of capital and labor, or a three-factor formula consisting of capital, labor, and sales, would not result in a more reasonable apportionment and, in fact, might well result in an improper apportionment of General Motors' income for tax purposes. (R. 208-10, 258-65, 295-99.)

In the year 1957, petitioner's sales to all of its customers amounted to $9,461,855,874, of which $37,185,704 derived from sales to District customers. The apportionable net income of petitioner amounted to $1,312,092,839. Applying the District's apportionment formula, the net income apportionable to the District for 1957 amounted to $5,156,525, less than four-tenths of one per cent of petitioner's total net income.

In 1958, petitioner's total sales to all of its customers were $7,853,393,381, of which $32,542,519 derived from sales to District customers. Apportionable net income for that year was $653,396,893 and the amount apportionable to the District, employing the District's formula, was $2,707,677, slightly more than four-tenths of one per cent of the net income subject to apportionment. (R. 465-69, 470e-470f, 477-81.)

The Tax Court declined to sustain the District's determination of General Motors' franchise tax liability for the years 1957 and 1958, holding that the District's formula, as applied to General Motors, was improper. That court devised a new and different formula consisting, not of the two factors of property and payroll, for which petitioner's economists had testified, but of three factors of property, payroll, and sales, equally weighted. (R. 487, 525-29.) On the basis of its formula, the Tax Court revised the District's assessments, ordering a refund to be made to General Motors of the difference. (R. 515-20.) The District appealed the decisions of the Tax Court to the United States Court of Appeals for the District of Columbia Circuit and a division of that court on February 21, 1968, affirmed the Tax Court, one judge dissenting. (R. 582-85, 592-96.)

Thereafter, on rehearing en banc, the entire court, four judges dissenting, reversed the Tax Court, holding that the District's apportionment formula is in all respects valid and applicable to General Motors Corporation. (R. 599-637.)

ARGUMENT

This case involves the District of Columbia Income and Franchise Tax Act of 1947, a statute applicable only in the District of Columbia and enacted by the Congress under its plenary power for the purpose of providing revenues requisite to the maintenance of essential District of Columbia functions. This Court has declined to review matters of a local nature confined in their application to the administration of District of Columbia law. *American Security and Trust Co.* v. *District of Columbia*, 224 U.S. 491 (1912); *United Security Co.* v. *American Fruit Product Co.*, 238 U.S. 140 (1915). As was said in *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285 (1935):

> "In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District."

The apportionment method employed by the District under regulations promulgated by the Commissioners of the District of Columbia pursuant to the Income and Franchise Tax Act of 1947 is not of recent origin, nor novel in its concept, for it has been in existence in substantially the same form since the inception of the act and was in use under the District of Columbia Income Tax Act of 1939,

the taxing act which preceded the present one, a total period of approximately twenty-seven years. This method utilizes a single factor of sales for the purpose of apportioning to the District income subject to District tax in cases where the taxpayer, as General Motors, is engaged in the business of selling personal property within and without the District. In cases arising under these Congressional taxing statutes the highest court of the District of Columbia has had frequent occasion to consider the validity of the District's apportionment formula and has sustained it. *Panitz* v. *District of Columbia*, 74 App.D.C. 284, 122 F.2d 61 (1941); *Eastman Kodak Co.* v. *District of Columbia*, 76 U.S.App.D.C. 339, 131 F.2d 347 (1942); *Lever Bros. Co.* v. *District of Columbia*, 92 U.S.App.D.C. 147, 204 F.2d 39 (1953); *District of Columbia* v. *Radio Corporation of America*, 98 U.S.App.D.C. 119, 232 F.2d 376, *cert. denied*, 352 U.S. 845 (1956); *Smoot Sand and Gravel Corp.* v. *District of Columbia*, 104 U.S.App.D.C. 292, 261 F.2d 758 (1958), *cert. denied*, 359 U.S. 968 (1959); *District of Columbia* v. *Evening Star Newspaper Co.*, 106 U.S.App.D.C. 360, 273 F.2d 95 (1959). All of these cases involved either an attack upon the validity of the Commissioners' regulatory apportionment formula, or the application of that formula to the factual circumstances present in the particular case in controversy. Attacks comparable to that made by General Motors have been made upon the formula on the ground that the formula is invalid for the reason that it failed to take into account the fact that personal property sold by the taxpayer in the District was produced by it elsewhere. These attacks were rejected by the Court of Appeals in *Eastman Kodak Co.* v. *District of Columbia, supra* and *Smoot Sand and Gravel Co.* v. *District of Columbia, supra.* Moreover, in *Smoot*, the taxpayer specifically urged that decisions of this Court require, and the Congress intended, that the District employ a three-factor apportionment formula based on sales, manufacturing costs, and property

values, the formula which General Motors urges must be applied to it.

In response to the argument of General Motors that the District must emply a three-factor formula using as ingredients sales, property, and payroll, each equally weighted, the majority of the Court of Appeals in this case said:

> "**** Read as we read it, the statute clearly permits although it does not require the single-factor sales formula adopted by the Commissioners.
>
> "The General Motors interpretation is obviously a complex and sophisticated one. We believe it more probable that the District's apportionment reflects the intent of Congress." R. 619.

Rejected also by the court were arguments of General Motors, reiterated in its petition for writ of certiorari, that the District's formula is violative of the Constitution. Every contention which General Motors argues here was argued fully before the Court of Appeals and fully answered by that court.

That the District's single-factor sales formula is not an improper formula for apportionment purposes is demonstrated by the fact that *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U.S. 271 (1924); and *National Leather Co.* v. *Massachusetts*, 277 U.S. 413 (1928), each sustained the use of a one-factor formula under the proof adduced in those cases.

General Motors argues that the District's formula violates the Commerce Clause of the Constitution, saying at page 11 of its petition:

> "The Commerce Clause prohibits the imposition upon interstate commerce of such cumulative burdens to which intrastate business is not subject."

It agrees, however, that the Commerce Clause is not a restraint upon the power of Congress to legislate for the District, but claims that it is a restraint upon action by the Commissioners of the District of Columbia. It relies upon *Stoutenburgh* v. *Hennick*, 129 U.S. 141, 148 (1889), referred to in *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 107 (1953). But *Stoutenburgh* involved not a formula devised for the apportionment of income for District tax purposes under an act of Congress, but an act of the District's Legislative Assembly, which was in all respects comparable to an enactment of a state legislature. Contrary to the matter involved in *Stoutenburgh*, the District's tax act, by its terms, requires apportionment to the District of that portion of the taxpayer's net income which reasonably can be said to have resulted from District activities. A formula which achieves that result, as does the District's, is in no wise invalid simply because it may incidentally involve interstate activities. *Butler* v. *McColgan*, 315 U.S. 501 (1942). Moreover, the District's act specifically provides for apportionment of the income of taxpayers engaging in multi-state operations,[1] for it says in article I, title X, section 2, § 47-1580a, D.C. Code, 1961, that:

> "**** If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be termed to be income from sources within and without the District."

General Motors' contention that the Commissioners' regulation under the statute is unconstitutional because General Motors "earned" its income through a series of transac-

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[1] Quoted at page 87a of General Motors' Petition. *Cf. Mercury Press, Inc.*, v. *District of Columbia*, 84 U.S.App.D.C. 203, 173 F.2d 636 (1948), *cert. denied*, 337 U.S. 931 (1949).

tions outside the District, as well as within it,[2] is answered by the fact that General Motors is engaged in a unitary business; the District is entitled to tax that portion of the income of the corporation which may be said to be fairly attributable to its activities within the District, just as was the case of New York State in *Bass, Ratcliff & Gretton* v. *Tax Commission,* 266 U.S. 271 (1924). In none of its decisions has this Court ever stated that an apportionment formula is invalid because it employs a single factor for apportionment of income; only where the method employed is grossly unreasonable has this Court, as in *Hans Rees' Sons, Inc.* v. *North Carolina,* 283 U.S. 123 (1931), invalidated a state's method of taxing multi-state income. That *Hans Rees' Sons,* so strongly relied upon by petitioner, is not applicable here is demonstrated by the statement of the Court of Appeals in its opinion that that case "*** does not closely resemble the one before us."[3]

General Motors argues, at pages 12 and 14 of its petition, that double taxation was established and also that a grossly disproportionate taxation was established. It bases its arguments almost entirely on statements of the Tax Court, whose conclusions were emphatically rejected by the Court of Appeals. In essence, the argument of General Motors is that because other states use formulas differing from that of the District, income taxed by the District would be taxed elsewhere. It attempts to demonstrate this result by hypothetical examples. But the examples appear to be self-defeating, for, in progression, it is possible to demonstrate that unless all formulas in use throughout the United States are identical and identically applied, each could be subject to attack on the ground of potential double taxation. This is a matter analogous to that envisioned by this Court in *Butler Bros., supra.,* where, after referring to

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[2] Petition p. 11
[3] R. 625.

the central purchasing method used by the taxpayer and its argument that this method, and not sales in California, produced profit, the Court quoted with approval the statement of the Supreme Court of California that:

> "Thus, by proceeding in turn from state to state, it could be shown that none of the sales in any of the states should be credited with the income resulting from the purchasing of goods in large quantitites." 315 U.S. at 509.

That General Motors' argument in this regard could lead to the questioning of the validity of any taxing formula can be demonstrated by the fact that the cases cited by petitioner at page 10 of its petition involved differing state taxing formulas which, necessarily, produced different tax results. Even in states employing the same kind of formula, the application of the formula would, in every case, have to be entirely consistent with the application of the formula elsewhere in order to avoid "double taxation." As an example, in the case of identical multi-factor formulas with payroll as one of the factors, it is entirely conceivable that one taxing jurisdiction could with justification include in that factor the pay of an employee which, for adequate reasons, is included in the payroll factor of another jurisdiction, thus providing an overlap which results in the taxing by both jurisdictions of a similar segment of income. Preciseness, as this Court has said many times, and as petitioner recognizes, is not required and perhaps not obtainable. (See Petition p. 15.)

Arguing that the District's formula improperly apportioned to the Distrtict a part of General Motors' net income which was greater than that which the District was allowed to tax, General Motors says:

> "In contrast, the single-factor *sales* formula reaches and is designed to reach the *entire* net in-

> come connected with every sale into the District, including profits earned by the application of capital and services in other jurisdictions." Petition p. 18 (petitioner's italics).

By statute the Commissioners' formula is required to provide to the District for tax purposes that amount of net income, so far as can be reasonably determined, which General Motors obtained through its District activities. As the District's statute provides:

> "**** The measure of the franchise tax shall be that portion of the net income of the corporation and uncorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District." § 47-1580, D. C. Code, 1961.

Significantly, petitioner speaks in terms of profits earned by the application of capital and services in other jurisdictions, not income from sales.[4] But nowhere has General Motors demonstrated that the District's formula, in fact, attributed to the District more of the corporation's net income than was reasonably attributable to its activities in the District. Moreover, the facts show that General Motors' activities in the District are extensive and varied, involving much more than the sale of its products. If, as contended by General Motors, income derived by it from activities outside the District may, in some unstated degree, be affected by the District's formula, similarly, much of the income of General Motors from activities outside the District may be produced by its activities within the District, for it maintains many offices here for the purpose of the sale of its products to the United States and for other purposes—all of which are directly connected with the generat-

[4] Petition p. 18.

ing of income. Accepting General Motors' premise, it is entirely conceivable that instead of apportioning too great an amount of the corporation's net income to the District, the Distrtict apportioned too little.

Relying on the Tax Court,[5] General Motors attacks the Court of Appeals' conclusion that the District's apportionment formula is not contrary to the taxing statute. Basically, the contentions of petitioner are stated in the form of hypothetical examples in no way pertinent to the situation existing in respect of General Motors. By hypothetical extremes completely inapplicable to it, General Motors attempts to show that it was unfairly taxed. Yet, as the record demonstrates, witnesses for General Motors contended before the Tax Court that only a formula consisting of factors of capital and labor or costs would fairly apportion its income.[6] Based on its own witnesses, General Motors (in any case where all of its payroll and property, for all practical purposes, are located in one jurisdiction and its sales are made in another), would not attribute to the jurisdiction of sale any of its income except in *de minimus* amounts. This is an equally extreme result.

The short answer to the examples employed by General Motors to buttress its contention that the District's regulatory formula is contrary to the statute is that the Court of Appeals has held it valid and that General Motors has not demonstrated that under this formula it has been improperly or unfairly taxed.

The operations of General Motors in the District of Columbia are much more varied and extensive than those which this Court described in its opinion of June 8, 1964, in *General Motors Corporation* v. *Washington*, 377 U. S. 436. General Motors maintains many more offices, and conducts many more activities in the District than it did in the State of Washington. Although in the conduct of

[5] Petition pp. 19-23.
[6] R. 99, 126-27, 137, 151-54.

certain of its activities, General Motors maintained in Washington some offices which it does not have in the District, all of the types of activities conducted by General Motors in that state are conducted in the District. Moreover, General Motors concedes its liability to District franchise tax, arguing only that the tax *must* be determined upon the basis of the formula devised by the District of Columbia Tax Court, and rejected by the Court of Appeals.

In *General Motors Corporation* v. *Washington*, the tax was imposed against General Motors for the privilege of engaging in business activities within that state, measured by General Motors' gross wholesale sales of motor vehicles, parts, and accessories delivered in that state. Despite contentions by General Motors that the tax was an unapportioned gross receipts tax on sales which constituted an inherently discriminatory tax on the privilege of engaging in interstate commerce, that it resulted in multiple tax burdens, and that it deprived General Motors of its property without due process of law (contentions substantially identical to those it makes in respect of the District's tax), both the Supreme Court of Washington and this Court held that Washington's tax was valid. Washington's tax was unapportioned and was directed to gross receipts; the District's tax is an apportioned tax, based not upon gross receipts, but upon General Motors' *net* income.

The considerations which in *Washington* this Court stated required it to reject General Motors' arguments against the validity of Washington's taxing act are at least equally applicable when applied to the District of Columbia.

CONCLUSION

For the foregoing reasons and in light of Rule 19 (1) (b) of this Court, it is apparent that petitioner has not shown that the decision below is in any way in conflict with decisions of another Court of Appeals or with applicable deci-

sions of this Court. Furthermore, the Court of Appeals for the District of Columbia Circuit, sitting en banc, clearly did not decide "an important state or territorial question in a way in conflict with applicable state or territorial law" since that court itself, as the highest judicial authority of the District, expounds the law for the District. Accepting *arguendo,* petitioner's contention that there are important questions of federal law involved in the instant case, those questions have already been determined by this Court against petitioner in numerous cases including *General Motors Corporation* v. *Washington, supra.*

Respondent respectfully submits that this case, involving matters of essentially local concern to the District of Columbia, does not warrant the exercise of this Court's sound judicial discretion to review the decision below on a writ of certiorari, and the petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 352

GENERAL MOTORS CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

Objection to Motions by Associated Industries of New York State, Inc., and Bethlehem Steel Company for Leave to File Briefs Amici Curiae in Support of the Petition for Writ of Certiorari

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Pursuant to Rule 42 (3) of the Rules of the Supreme Court of the United States, Respondent District of Columbia respectfully opposes the motions by Associated Industries of New York State, Inc., and Bethlehem Steel Company for leave each to file a brief *amicus curiae* in support of the petition for writ of certiorari in the above-entiled case. Respondent has withheld its consent to the filing of said briefs for the reasons set forth below.

Rule 42 (3) of the Court requires an applicant for *amicus curiae* to

> "*** state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case***."

It is respectfully submitted that neither applicant herein has fulfilled these requirements, nor can either applicant do so. Primarily, neither applicant has set forth any facts or questions of law that have not been adequately presented by the petitioner or by the respondent herein. Applicant Associated Industries of New York State, Inc., states merely that it wishes "to clarify the presentation" and Applicant Bethlehem Steel Company "to emphasize to the Court the importance" of the questions already presented and emphasized by the petitioner.

Both parties in this case are, and have been through some three years of litigation, adequately represented by competent counsel, and all issues have been fully presented throughout. That the applicants have presented no issues of fact or law not already fully presented by the parties herein is manifest from the fact that the "Questions Presented" of the proposed brief of Applicant Associated Industries of New York State, Inc., are essentially identical to the "Questions Presented" by the petitioner herein. The proposed brief of Applicant Bethlehem Steel Company, while not setting forth any formal "Questions Presented," similarly propounds, at pp. 5-6, the very same issues which the applicant for the writ of certiorari desires to be decided by this Court. What was said by this Court in 1903 is precisely applicable to the present case: "as the parties are represented by competent counsel, the need of assistance cannot be assumed ***." *Northern Securities Co.* v. *United States*, 191 U.S. 555, 556 (1903). See also *United States* v. *General Electric Co.*, 95 F. Supp. 165 (D.N.J. 1950).

The function of an *amicus curiae* is to call the Court's attention to matters of law which might otherwise escape

its consideration or cause it to make error. See generally 4 Am. Jur. 2d, *Amicus Curiae;* 3 C.J.S., *Amicus Curiae.* An *amicus curiae* is technically a "friend of the Court," as distinguished from an advocate. *Allen* v. *County School Board of Prince Edward County,* 28 F.R.D. 358 (E.D. Va. 1961). See also *United States* v. *Loew's, Inc.,* 20 F.R.D. 423 (S.D. N.Y. 1957), wherein it was held that the proposed intervenor's current position as an adverse party litigant in a private antitrust action in another federal District Court, would impair its effectiveness as *amicus curiae* and leave to act as such was denied. By reason of the stated interests of the applicants in the instant case and in its outcome, neither is in a position to give this Court the disinterested and nonpartisan advice which is in the highest tradition of *amici curiae.*

Applicant Associated Industries of New York State, Inc., asserts in its motion, p. 2, that, because of the decision in this case by the United States Court of Appeals for the District of Columbia Circuit, sales by its members in the District of Columbia "for the years in question, 1957 and 1958," "are now taxable by the District of Columbia on 100% of the net income." However, in respect of District income and franchise taxes, section 47-1586i (a) (1), D. C. Code, 1961, states that:

> "(1) the amount of income taxes imposed by this subchapter shall be assessed within three years after the return is filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period ***."

The applicant does not state, and respondent is not advised, whether any of its members have matters pending before the District tax authorities. The applicant similarly does not state any reasons why the above-quoted limitation might

not apply,[1] nor is there any question that more than three years have elapsed since the years concerned. Based on the bare assertion set forth above. the applicant thus expresses apprehension concerning the imposition of a tax which cannot, under the applicable act of Congress, be assessed or collected. Its stated interest in the instant case is therefore remote and hypothetical. The words of *Northern Securities Co., supra,* are again appropriate: "It does not appear that applicant is interested in any other case which will be affected by the decision of this case***." The application should therefore be denied.

Applicant Associated Industries of New York State, Inc., further states that the decision by the Court of Appeals below "constitutes an open invitation to other jurisdictions to enact similar one-factor formulae, thus subsidizing intrastate business by burdening interstate commerce with discriminatory and multiple taxation." Assuming, but not conceding, that this assertion constitutes a statement of relevancy to the disposition of this case of questions not adequately presented by the parties, the point is not well taken. The Congress of the United States exercises full plenary power over the District of Columbia. *Neild* v. *District of Columbia,* 71 U.S.App. D. C. 306, 110 F.2d 246 (1940), *approved, National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.,* 337 U.S. 582, 601-02 (1949). Legislation for the District is not therefore circumscribed by the commerce clause. In fact, Congress may "discriminate" in tax legislation for the District of Columbia when states may not constitutionally enact similar discriminatory taxation measures. *Mercury Press, Inc.* v. *District of Colum-*

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[1] See D.C. Code, 1961, § 47-1586i (a) (3) (five year statute of limitations for omission from gross income of an amount in excess of 25 per cent of the amount of gross income stated in the taxpayer's return; five years, however, would have already elapsed since the years in question, 1957 and 1958), and § 47-1586i (b) (no limitations for a false or fraudulent return).

bia, 84 U.S.App.D.C. 203, 173 F.2d 636 (1948), *cert. denied*, 337 U. S. 931 (1949). The decision of the court below with respect to the unique tax authority of the District of Columbia thus by no means "constitutes an open invitation to other jurisdictions" to promulgate similar tax measures. The applicant therefore fails to establish that the taxation of its members in other jurisdictions is relevant to the disposition of this case. For the same reasons the applicant fails to state an interest in the instant case arising from any supposed harm to the commerce of its member companies in other jurisdictions.

Applicant Bethlehem Steel Company does state an interest in the form of appeals, claims for refund, and protests pending before the District of Columbia tax authorities. However, as above stated, it has altogether failed to set forth any "facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties."

For the foregoing reasons, and for the additional reason that motions for leave to file briefs *amici curiae*, consent having been refused, "are not favored" (Rule 42 (1)), it is respectfully submitted that the motions by Associated Industries of New York State, Inc., and Bethlehem Steel Company for leave to file briefs *amici curiae* in support of the petition for writ of ceriorari should be denied.

Respondent has received additional requests to consent to the filing of briefs *amici curiae* in support of the petition for certiorari in this case. Consent to those requests has similarly been withheld. Respondent has no information as to whether other motions such as those opposed herein will be filed. However, insofar as the reasons stated herein may be applicable to any further motions for leave to file

briefs *amici curiae*, respondent respectfully opposes such motions on the same grounds as above stated.

Respectfully submitted,

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